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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANNA S., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANNA S.,

Objector and Appellant.

D053800

(Super. Ct. No. SJ10893D)

APPEAL from an order of the Superior Court of San Diego County, George W.
Clarke, Judge. Reversed.

Child Anna S. appeals the order granting the Welfare and Institutions Code¹
section 388 petition of her mother, Angelina S., and placing Anna with Angelina, with
family maintenance services. We reverse.

¹ All statutory references are to the Welfare and Institutions Code.

BACKGROUND

Beginning in early 2001, there were several child welfare referrals regarding the three sons of Angelina and her husband, Tobias S. In November, Tobias hit Angelina, giving her a black eye. Tobias was arrested, but Angelina refused to cooperate with the police. The San Diego County Health and Human Services Agency (the Agency) filed dependency petitions due to emotional abuse of the children. Early in the case a psychological evaluation noted that Angelina lacked awareness of her children's needs and was prone to comply with Tobias's demands, even if it meant sacrificing her children's well-being.

Angelina and Tobias received 18 months of reunification services and six months of family maintenance services. During the reunification period, Angelina appeared for a visit with a bruised cheek and a black eye. She claimed that she had fallen in the bathtub, but later admitted that Tobias had hit her. She also acknowledged that she had seen Tobias hit, kick, and slap their sons. Angelina obtained a restraining order against Tobias and relocated to a confidential address. After dependency jurisdiction terminated in November 2003, Angelina became pregnant with Anna and resumed living with Tobias. Anna was born in November 2004. Tobias is Anna's presumed father.

In November 2005, the Agency filed a dependency petition for Anna after Angelina threatened to kill Anna and herself. Anna was detained at Polinsky Children's Center (Polinsky) and then placed with a nonrelative extended family member.

A social worker interviewed Angelina in December 2005. Angelina said that Tobias would often belittle her, push her, grab her by the arm, leaving bruises, and that he

frequently raped her. When the social worker asked whether Angelina intended to file a police report, she responded in the negative. Angelina said that she was afraid of Tobias, but believed that he would not hurt her again because the Agency was involved with the family. She initially refused to obtain a restraining order, but later agreed to do so. Several hours after the interview, Angelina called the social worker and recanted her allegations regarding Tobias.

During a February 2006 psychological evaluation, Angelina denied that Tobias had been violent or that he had raped her. She told the Agency that she was sleeping in her van or with friends, but declined housing assistance. In July, Angelina told the social worker that she was still homeless, but subsequently admitted that she was living with Tobias. She said on several occasions that she intended to stay with him. By mid July, Angelina had completed a 12-week parenting class, a 13-week domestic violence support group, and five months of individual therapy. In September, she and Tobias began conjoint counseling. The counselor noted that Tobias was controlling and domineering, while Angelina seemed intimidated and had a strong tendency to deny problems. In January 2007, Angelina and Tobias switched to a counselor of their own choosing. In February, they began receiving in-home parenting education and other services.

In March 2007, Anna was placed with Angelina and Tobias. In June, Tobias threw a broom at Anna's eight-year-old and 10-year-old brothers, and chased and threatened one of the boys. The incident came to light because Angelina inadvertently recorded her conversation with her son on her therapist's voicemail. The therapist told Angelina that he was a mandatory reporter and would have to report the incident. He

suggested that she make the report instead. She complied. After she made the report, Angelina told the social worker that she was able to keep Tobias out of the home for only one day, and said that she was not willing to go to a shelter. Anna was detained at Polinsky. Later that month, Anna was moved to a foster home, which became a placement.² On the day that Anna was moved to the foster home, Angelina called the social worker and said that her relationship with Tobias was over and that she was ready to leave him. Angelina repeated those statements twice within the next week, but remained with Tobias.

In early August 2007, Angelina again said that she was ready to leave Tobias and asked the social worker for help. Angelina reported that Tobias physically abused the boys, that Anna cried when Tobias yelled, and that he picked Anna up and shook her. Angelina moved to a shelter and the court ordered that there be no contact between her and Tobias. In late September, after this case had been pending for 22 months, the court terminated reunification services and set a section 366.26 hearing.

In March 2008, Angelina resumed attending monthly domestic violence classes and moved to a home for recovering substance abusers.³ The home would allow Anna to live there with Angelina as soon as another resident left. Angelina's longtime therapist, psychologist Joel Lazar, reported that Angelina had no plans to reunite with Tobias, that she attended therapy consistently, and that she had made "significant progress" toward

² Anna's three older brothers were also removed from parental custody.

³ There is no evidence that Angelina had a substance abuse problem.

her goals of reducing her depression and dependency, strengthening her self-confidence and self-reliance, and increasing her ability to protect her children and herself. Sometime in 2008, Angelina completed another parenting class.

In May 2008, Angelina filed her section 388 petition requesting modification of the September 2007 order setting the section 366.26 hearing. In her petition, Angelina asked that Anna be placed with her, with either termination of jurisdiction or the provision of family maintenance services. As changed circumstances, the petition claimed that Angelina had made substantial progress in individual therapy, demonstrating her ability to protect Anna. The petition also claimed that it would be in Anna's best interests for her to live with Angelina. Angelina would have no other children in her custody, and would focus on Anna's emotional and physical needs and furthering Anna's relationship with her siblings.

Angelina and Anna loved each other, and Angelina was appropriate with Anna during their supervised visits. At the same time, Anna was thriving in foster care. In late June 2008, Anna began to have visits with a prospective adoptive family as part of her transition into their home. Anna was living with that family by the time the section 388 hearing took place in September. The court granted Angelina's petition and placed Anna with her.

DISCUSSION

I

The Court Abused its Discretion In Granting Angelina's Section 388 Petition

A

Legal Principles

Section 388 allows the juvenile court to modify an order if a party establishes, by a preponderance of the evidence, that changed circumstances exist and that the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] ' "[C]hildhood does not wait for the parent to become adequate." ' [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Where, as here, there is a request for a change of placement after reunification services have been terminated, the focus is on the child's need for permanency and stability, "and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review the juvenile court's ruling on a section 388 petition for abuse of discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704; *In re Jasmon O.* (1994) 8 Cal.4th 398,

415.) We conclude that Angelina did not meet her burden of showing changed circumstances, or that placing Anna with her would promote Anna's best interests.

B

The Section 388 Hearing

Dr. Lazar testified that he did not believe that Angelina's threat to harm Anna at the outset of this case was "a literal threat." He opined that Anna should be placed with Angelina and believed that there was "no more than [a] mild" risk to Anna. He acknowledged, however, that this was "not an exact science" and that he was not trained in assessing such risks.

Dr. Lazar testified that Angelina separated from Tobias in June 2007 in order to prevent the removal of the children. He believed that the social worker had acted unfairly by removing the children when Angelina did not immediately agree to a separation from Tobias, noting that she left him later that same day. Angelina told Dr. Lazar that she would not reunite with Tobias because he posed an emotional threat to her and the children, he had been physically aggressive, and he had stood in the way of her job training. Dr. Lazar believed that this separation was different from the previous ones because Angelina was participating in domestic violence treatment and was living in a shelter. He noted that she had been separated from Tobias for more than a year and said he believed she had "the tools to remain independent."

When asked about the June 2007 incident in which Tobias threw a broom at the boys, Angelina testified that the boys had not been frightened, and said that she did not know whether the incident had a serious effect on them. Angelina admitted that she

would not have reported the incident to the Agency if Dr. Lazar had not confronted her, and said that she did not know whether she would have reported it to him if it had not been recorded. After the incident, the social worker gave Angelina about 20 minutes to decide whether to separate from Tobias, in order to prevent the children's removal. When asked whether she would have done anything differently, Angelina testified that she "probably would not trust the social worker at all." She did not believe that the removal was necessary.

Angelina testified that any allegations that Tobias had physically abused her were unsubstantiated, claimed that he had bruised her only "inadvertently," and denied having said that he raped her. When asked whether she entertained any thoughts of reuniting with Tobias, Angelina testified, "[A]t the present time, no," but then added, "[N]obody can predict the future." Angelina explained that she had separated from Tobias because "at the present time we do not get along." She said that both she and Tobias had to obtain "the skills we both need to be able to make the relationship work"—communication and problem solving. When asked whether Tobias posed a threat to her, Angelina replied, "[A]t least emotional if nothing else." She did not know whether she would be safe with him, or whether she would want to live with him if there were no children in the household. She also did not know whether she would still be with him if the June 2007 incident had not occurred. When asked whether Tobias was overbearing, Angelina responded, "I don't feel I'm qualified to say that because of my upbringing"

The court granted Angelina's section 388 petition, finding that there had been "a significant change of circumstances" since the September 2007 referral hearing, based on

Angelina's "programming, her performance in services and taking all the evidence into account." The court also determined that it would be in Anna's best interests to be returned to Angelina's care, finding that return would not create a substantial risk of detriment. The court ordered that Anna be placed with Angelina, with family maintenance services. The court declined to terminate jurisdiction, concluding that "closing the case today would be likely to recreate the conditions that initially caused the assumption of jurisdiction."

C

Analysis

Over the course of this case and the earlier case, Angelina received more than three years of services. She separated from Tobias three times, and Anna was removed from her care twice—the second time just three months after Anna was placed with her. Angelina said many times that Tobias physically abused her. This was borne out by her visible bruises. Angelina also reported that Tobias physically abused their sons. This was borne out by the recorded conversation. Despite this abuse, after 2001 Angelina never attempted to obtain another restraining order against Tobias. At the section 388 hearing, she denied that Tobias was violent and even denied that he was overbearing. She expressed no remorse for what the children had suffered. Her only regret was that the Agency had found out about the abuse. Angelina indicated that her plans to remain separated from Tobias did not extend beyond "the present time." She implied that her plans might change once she and Tobias improved their communication skills. In short, Angelina's own testimony constituted significant evidence that there had been no real

change of circumstances and that placing Anna with her would not be in Anna's best interests.

The court's own finding that terminating jurisdiction "would be likely to recreate the conditions that initially caused the assumption of jurisdiction" further bolsters this conclusion.⁴

Dr. Lazar's testimony was equally unhelpful to Angelina. He minimized the facts that led to the dependency, and had no training in assessing the risk in returning a dependent child to her parents. He cited unchanged factors—Angelina's participation in domestic violence treatment and residence in a shelter—as reasons why her current separation from Tobias was different from past separations.

By the time of the hearing on Angelina's section 388 petition, Anna was almost four years old and had been in and out of the dependency system for nearly three years. Her need for safety and stability was paramount. The only reasonable inference to be drawn from the evidence was that the circumstances that led to Anna's dependency had not in fact changed, and that returning Anna to Angelina's custody would not be in Anna's best interests, but rather, would perpetuate the instability and risk that Anna suffered during the long periods in which Angelina had the opportunity to reunify. The court erred by granting Angelina's section 388 petition.

⁴ Indeed, at the time of the hearing there was no space for Anna in Angelina's recovery home and there was no evidence that Angelina had any other place to live—the same circumstances that caused her to return to Tobias when she was pregnant with Anna.

DISPOSITION

The order granting Angelina's section 388 petition is reversed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.